Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

CHARLES G. GUTH, on his own behalf and on behalf and for the benefit of all other stockholders of PHOENIX SECURITIES CORPORATION, a corporation,

Petitioner,

against

WALLACE GROVES and W. W. COLPITTS,

Respondents.

BRIEF IN SUPPORT OF PETITION OF CHARLES G. GUTH, FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court (R. 51-54) on dismissal of the above-entitled cause as to respondents for lack of venue, is reported in 44 F. Supp. 855. The Circuit Court of Appeals for the Second Circuit affirmed the judgments of dismissal without opinion (R. 58).

Jurisdiction

The judgment of the court below was entered on September 9, 1942 (R. 58-59). On December 4, 1942, the time to apply for certiorari was extended to and including January 1, 1943, by order of Associate Justice Jackson (R. 59). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A., Section 347(a).

Statement and Summary of the Case

The statement and summary of the case, with record citations, are set forth in the petition (pp. 1, 2, *supra*).

Specification of Errors

The court below erred:

1. In holding that the District Court did not have venue of the respondents.

2. In holding that, for the purpose of venue of the defendants in this action, the defendant Phoenix Securities Corporation was not a resident of the State of New York.

3. In holding that the District Court did not have venue of the respondents notwithstanding the right of Phoenix Securities Corporation to sue for redress of the same wrongs to it in the courts of the State of New York within the Southern District of New York.

4. In affirming the decision of the District Court dismissing the action with respect to the respondents for lack of venue.

ARGUMENT

SINGLE POINT

The Court below erred in dismissing the action against respondents for improper venue.

Petitioner is a citizen and resident of the State of Maryland (R. 9). The Phoenix Securities Corporation is a Delaware corporation, qualified to do business in the State of New York (R. 9, 55); and has its principal office and place of business at 44 Wall Street, in the City of New York (R. 55). Groves alleges in his motion to dismiss that he is a resident of the State of Connecticut (R. 43); and Colpitts, of the State of New Jersey (R. 49). The District Court says that "Groves claims to be a resident of Greenwich, Connecticut, and the defendant Colpitts of Princeton, New Jersey" (R. 52). On that finding, the Court ruled for dismissal of the action (R. 52-53), saying:

> "Plaintiff can sue only in the district in which he or the objecting defendants reside, or in which the defendant Phoenix might sue such objecting defendants, and nowhere else. *Philipbar* v. *Derby*, 85 F. (2) 27-30, 28 U.S.C.A. Section 112. Neither plaintiff nor either moving defendant resides in this district, and the defendant Phoenix could not sue either of them here, for this is not the district in which any of them reside."

This statement represents the core of the decision of the District Court, which was affirmed without opinion by the Circuit Court of Appeals (R. 58).

Petitioner brought this action under Section 51 (Tit. 28 U.S.C., Sec. 112) of the Judicial Code, the pertinent portion of which provides:

> "* * * where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant; *except that suit by a stockholder on behalf*

of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholder's action, other than said corporation, might have been brought by such corporation, and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." (Italics supplied).

The exception as to stockholders' suits was added on April 16, 1936 (C. 230, 49 Stat. 1213). It is a remedial provision designed to prevent defendants in stockholders' suits from escaping liability by invoking the former venue restrictions.

The decision appealed from represents a backward step from the decision of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, in that it fails to follow that case with respect to the new concept of residence of a foreign corporation qualified to do business in another state; it misapprehends the character of the Phoenix Corporation as an essential party plaintiff in a stockholder's suit; and disregards the rights of the corporation and the responsibilities of respondents under New York law in holding that the corporation could not sue respondents in that jurisdiction.

In so far as the facts of this case are concerned, the above provision presents three questions:

I.—*Who are the real parties to the stockholder's suit which petitioner brought against respondents in the United States District Court for the Southern District of New York?*

Petitioner filed suit in his own name; but he is a nominal plaintiff only. The real plaintiff in a stockholder's suit is the corporation in whose behalf the suit is brought —in the instant case the real plaintiff is the Phoenix Corporation. The relief asked in the complaint is that respondents be ordered to pay to the corporation the amount ascertained and determined to be due (R. 35). The law is

definitely established that in a suit of this character the corporation, though properly a nominal defendant, is "to be regarded as really the complainant" (*Edwards* v. *Bay State Gas Co.* (C.C.), 91 Fed. 942); that a "cause of action for wrong done to the corporation belongs to the corporation" and not to the stockholders (*Koral* v. *Savory, Inc.*, 276 N.Y. 215, 11 N.E. (2) 883; *Baker* v. *Allen*, 292 Mass. 169, 172, 197 N.E. 521; *Sias* v. *Johnson*, 86 F.(2d) 776, C.C.A. 6); that petitioner is the mere "instigator" of the action (*Potter* v. *Walker*, 293 N.Y. Supp. 161, App. Div.), the "agent of the corporation", and he, in effect, is "the corporation suing" (*Gerith Realty Corp.* v. *Normandie National Securities Corp.*, 154 Misc. 615, 276 N.Y. Supp. 655; affd. 269 N.Y. Supp. 1007, 241 A.D. 717; affd. 266 N.Y. 525); that "The corporation, and not he, is the beneficiary of any relief granted. If there is a money judgment it runs in favor of the corporation, although the corporation may be a defendant in the action" (*Wangrow* v. *Wangrow*, 211 App. Div. 552, 556, 207 N.Y. Supp. 132; *Baker* v. *Allen*, 292 Mass. 169, 172, 197 N.E. 521). In *Arn* v. *Bradshaw Oil & Gas Co.*, 93 F. (2d) 728, 731, C.C.A. 5, the Court put it as follows:

> "We think the suit, brought as it was, for the benefit of the corporation, must, under the facts pleaded, be regarded as brought by the corporation and for the protection of its interests in the property in suit."

The District Court erred, therefore, in dismissing petitioner's suit on the theory that petitioner was the real plaintiff, and the Phoenix Corporation was merely one of the defendants.

Even if petitioner were held to be the real plaintiff in this action, that would not change the result, since he sued the Phoenix Corporation in the Southern District, of which it is a resident, and where it was subject to suit under New York law (Art. 13, Sec. 223, General Corporation Law; *Dodge Mfg. Co.* v. *Patten*, 60 F.(2) 676, C.C.A. 7; *Overfield*

v. *Pennroad Corp.*, 113 F.(2) 6, C.C.A. 3; *Schwarz* v. *Artcraft Silk Hosiery Mills, Inc.*, 110 F.(2) 465, C.C.A. 2; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165); and respondents were served personally in the Southern District, where they, too, were subject to suit under New York law (Art. 25, Sec. 229-b, Civil Practice Act, *infra*, p. 13; *Routenberg* v. *Schweitzer*, 165 N.Y. 175).

II.—*What is the "residence" of the parties to the action herein?*

If it be conceded that Groves and Colpitts, respondents, reside in Connecticut (R. 43), and New Jersey (R. 49), respectively, we still must determine the residence of the Phoenix Corporation under Section 51 of the Judicial Code, as amended. The District Court held that it was in Delaware, the state where it was incorporated (R. 52). Obviously, the courts below still hold to the antiquated theory of corporate residence announced over a century ago by Chief Justice Taney, in *Bank of Augusta* v. *Earle* (1839), 13 Pet. (U.S.) 519, 588, when legal concepts in the field of corporation law were in their infancy (Mayers, Introduction to the Law of Business Corporations (1939) 20). But the Phoenix Corporation is qualified to do business in the state of New York (R. 9, 55), and its principal office and place of business is at 44 Wall Street, in the City of New York (R. 55). New York is where the corporation has elected "to live" and transact all its corporate business (*The German-American Coffee Co.* v. *Diehl*, 216 N.Y. 57, 109 N.E. 875); and to pretend that its residence is in Delaware is to ignore reality for fiction, fact for metaphor. The words of the Supreme Court of California in *Wait* v. *Kern River Mining, Milling & Developing Co.* (1909), 157 Cal. 16, 106 Pac. 98, which dealt with an Arizona corporation doing business in California, are applicable here. Said that Court:

> "It is a foreign corporation only in the sense that it is created in another State, and continues to

> enjoy corporate life by permission of that State. In every other sense, it is solely a California corporation. So far as it does or can do business at all, it does it solely by permission of this State, and within its borders. Under such circumstances, its residence in Arizona, or anywhere else outside of California, is the merest fiction."

The modern view on this particular question is that a juristic person, like a natural person, is, for purposes of legal process, a resident of the state where it regularly conducts its business. The highest English courts have so held since 1855 (*Carron Iron Co.* v. *Maclaren* (1855), 5 H.L. Cas. 416, 449, 10 Eng. Repr. 961, 975; *La Compagnie Generale Transatlantique* v. *Thomas Law & Co.* (1899), A. C. 431, 433, H.L.; *De Beers Consolidated Mines, Ltd.* v. *Howe* (1906), A.C. 455, 458, H.L.). This is also the view of the Circuit Courts of Appeals for the Second (*Harr* v. *Pioneer Mechanical Corp.*, 65 F.(2d) 332, 334, *c. d.*, 290 U. S. 673), Third (*Dehne* v. *Hillman Investment Co.*, 110 F.(2d) 456), and Seventh (*Dodge Mfg. Co.* v. *Patten*, 60 F.(2d) 676) Circuits; and of this Court (*International Harvester Co.* v. *Kentucky*, 234 U.S. 579, 583). The Courts of New York leave no doubt as to where they stand on this issue. They hold consistently that a foreign corporation which has received its license to do business there, and filed a designation of an agent upon whom process may be served, is "a resident of this State within the contemplation of the law" (*Gaunt* v. *Nemours Trading Corp.*, 194 App. Div. 668, 186 N.Y.S. 92); that "In its transaction of business in New York, it is to be dealt with, *pro hac vice*, as a domestic corporation" (*Comey* v. *United Surety Co.*, 217 N.Y. 268); and that, "The corporation is here; it is here in the person of an agent of its own selection; and service upon him is service upon his principal" (*Tauza* v. *Susquehanna Coal Co.*, 220 N.Y. 259, 268).

This principle has attained international recognition as is evident from Article 10 of the Montevideo Treaty on *International Civil Law* (1940), which reads:

> "Juristic persons of a civil character have their domicile where they maintain the principal place of business."

The net result of these views is that although the Phoenix Corporation owes its legal existence to the laws of Delaware, it must be considered, for jurisdictional purposes, as having its residence in the Southern District of New York, within the meaning of Section 51 (Tit. 28 U.S.C., Sec. 112) of the Judicial Code.

* * *

Petitioner's argument, thus far, has been predicated on the venue requirements of the diversity of citizenship provision of Section 51, as it stood prior to April 16, 1936. But petitioner further contends that, in bringing suit, he was not restricted to the "district of residence of either the plaintiff or the defendant". The 1936 amendment to Section 51 gave him the right to sue "in any district", independently of the residence of the parties, in which the corporation might have sued. This amendment is incorporated in Section 51 as an *exception* to the residence requirement of the diversity of citizenship provision. Its purpose is to exempt a stockholder absolutely from the operation of the residence requirement. "An exception takes out of an enactment something which would otherwise be part of the subject-matter of it." (*Western Assur. Co.* v. *Mohlman Co.*, 83 Fed. 811, 815, C.C.A. 2; *Arnold* v. *United States*, 147 U.S. 494, 499). So that, in the view which petitioner takes of this question, he could have sued respondents in any district where he could have found them, without regard to their place of residence, providing the Phoenix Corporation could have sued them in that district. In suing respondents in the Southern District, petitioner chose the district where the Phoenix Corporation could have sued them under New York law.

III.—*Did the Phoenix Corporation, in whose behalf petitioner brought this action, have the right, under the 1936 amendment to Section 51 of the Judicial Code, to sue respondents in the United States District Court for the Southern District of New York? and, if so, whether that right inured to petitioner?*

This presents a mixed question of federal and state law.

(a) STATE LAW.—The Phoenix Corporation is authorized to do business in the State of New York, and has its principal office and place of business at 44 Wall Street, in the City of New York (R. 9, 55). In order to secure a Certificate of Authority to do business there, it had to present to the secretary of state, under Article 13, Section 210(1) of the New York General Corporation Law,* a "designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state." As a duly licensed corporation, it could maintain an action "in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation";** and it

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* "Sec. 210. AUTHORIZATION OF FOREIGN CORPORATIONS, OTHER THAN MONEYED CORPORATIONS, TO DO BUSINESS WITHIN THE STATE.

A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

(1) It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president * * * , which shall set forth the state or country of its incorporation, the place where its office within this state is to be located * * * ; the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state."

** "Sec. 223. ACTION BY FOREIGN CORPORATION. An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law." See *Eclipse Silk Mfg. Co.* v. *Hiller*, 145 A.D. 568, 571, 129 N.Y.S. 879 (1911).

could also be sued "for any cause of action",* even by a non-resident.**

Respondents claim that they are non-residents. Let us grant they are; they also are officers of the Phoenix Corporation (R. 38, 39); and the suit is against them for "frauds and acts of malfeasance, misfeasance and nonfeasance committed by them against" the corporation and other stockholders (R. 9), within the State of New York. Under those circumstances, they were suable (*Routenberg* v. *Schweitzer*, 165 N.Y. 175), and amenable to the service of process in New York in the form prescribed in Article 25, Section 229-b of its Civil Practice Act.†

(b) FEDERAL LAW.—Under Section 51 (Tit. 28 U.S.C., Section 112) of the Judicial Code, as it stood prior to April 16, 1936, petitioner, as agent of the Phoenix Corporation, could have brought suit "only in the district of residence

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* "Sec. 224. ACTION AGAINST FOREIGN CORPORATION. An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

** "Sec. 225. ACTION AGAINST FOREIGN CORPORATION BY ANOTHER FOREIGN CORPORATION OR NON-RESIDENT. An action against a foreign corporation may be maintained by * * * a non-resident, in one of the following cases only: * * * 3. Where the action arose within the state, except where the object of the action is to affect the title to real property situated without the state. 4. Where a foreign corporation is doing business within this state."

† "SERVICE OF SUMMONS ON NON-RESIDENT NATURAL PERSON DOING BUSINESS IN THE STATE. When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who, at the time of service, is in charge of any business in which the defendant or defendants are engaged within this state, and any summons so served shall be of the same legal force and validity as if served personally on such non-resident person or persons so engaging in business in this state within the territorial jurisdiction of the court from which the summons issue, provided that a copy of such summons and complaint together with a notice of such service upon such person in charge of such business according to the provisions of this section shall be forthwith sent to such non-resident person or persons by registered mail, return receipt requested."

of either the plaintiff or the defendant." After the 1936 amendment, petitioner could bring suit "in any district in which suit against the defendant or defendants in said stockholder's action, * * * might have been brought by such corporation."

If, therefore, the Phoenix Corporation could have sued respondents in New York under the law of that state, petitioner had that right, too, under the 1936 amendment to Section 51.

In the instant case, the Corporation filed its consent to be sued in the courts of the state of New York. This consent, and the state law authorizing suit by or against the Corporation, "bring about a state of facts which will authorize the courts of the United States to take cognizance of a case" (*Ex parte Schollenberger,* 96 U.S. 369, 377; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 175). In fact, the ruling of this Court in a late case is that the federal courts in a state are courts of that state "within the scope of that consent" (*Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U.S. 4, 7. See also, *Dehne* v. *Hillman Investment Co.,* 110 F. (2) 456, 458, C.C.A. 3).

The cases uniformly uphold the right of petitioner to sue as a stockholder in the District Court for the Southern District of New York, of which the Phoenix Corporation is resident, even though it is a Delaware corporation, and respondents reside outside the Southern District. In *Schwarz* v. *Artcraft Silk Hosiery Mills, Inc.* (1940), 110 F.(2) 465, C.C.A. 2, an action for accounting was instituted in the federal courts for the Southern District of New York against a Delaware corporation which maintained a sales office in the City of New York, and its president, a resident of the State of Pennsylvania, whose domicile was in Florida. The summons was served on its president during a temporary visit to New York. One of the questions before the court was whether the Southern District of New York was the proper venue of the action. The court observed that since the *Neirbo* decision it may

be that the Artcraft corporation "is to be treated as a resident of the Southern District of New York." Then it added:

> "New rights and privileges established by a state may be enforced in federal courts, Cowley *v.* Northern Pacific R. Co., 159 U. S. 569, 16 S. Ct. 127, 40 L. Ed. 263, to the same extent as in the state courts. Davis *v.* Gray, 16 Wall. 203, 21 L. Ed. 447. As such a suit, this action was properly brought in the Southern District of New York."

In *Overfield* v. *Pennroad Corp.* (1940), 113 F.(2) 6, C.C.A. 3, a stockholder's suit was brought in the United States Court for the Eastern District of Pennsylvania, by plaintiff, a citizen and resident of Utah, against the Pennsylvania Railroad, and the directors and officers of Pennroad Corporation, a Delaware corporation, which maintained its principal and only office in Delaware. The defendant was served in Delaware. It moved to dismiss for want of jurisdiction of the subject-matter, or in lieu thereof, to quash the return of the service of summons upon it. The District Court refused to quash. The Circuit Court thought the action of the District Court "was entirely proper," and, in considering Section 112, said:

> "The plain words of this statutory provision admit of no departure from their meaning by way of interpretation. The power of Congress to determine the venue of an action and to provide for service of process elsewhere has been expressly confirmed. * * * It cannot be disputed that Pennroad, a Delaware corporation, could have maintained a suit in the court below for the same cause of action on the ground of diversity of citizenship. * * * Applying, then, the clear intent of the statute to the facts in this case, it follows conclusively that Pennroad was amenable to service of the summons in the district where it resides or may be found. And that is precisely where Pennroad was served."

Dodge Mfg. Co. v. *Patten* (1932), 60 F.(2) 676, C.C.A. 7, was an action in the federal court for the Northern District of Indiana, by a non-resident against a Delaware corporation whose principal office, factory and place of business were in the district where the action was brought. Defendant objected to the venue of the action "because neither it nor appellee is or was a resident of the judicial district of the trial court" as required by Section 51 of the Judicial Code. In answering the objection the court referred to the opinion of Mr. Justice Harlan in *United States* v. *Southern Pacific Railroad Co.* (C.C.), 49 Fed. 297, 302, that a corporation, for the purposes of jurisdiction *in personam,* may have additional habitations in states other than the one in which it was incorporated; and quoted with approval this statement by the Justice:

> "If it be said that inhabitancy in a state, in its strict legal sense, implies a permanent, fixed residence in that state, the answer is that a corporation of one state, operating, by agents, a railroad or telegraph line in another state, with its consent, or under its license, may be regarded as permanently identified with the business and people of the latter state, and, for the purposes of its business there, to have a fixed residence within its limits; * * * It does there just what it would do if it had received its charter from that state."

The Circuit Court of Appeals said that it was impressed with this reasoning, and was convinced "that it is not inconsistent with the later rulings of the Supreme Court. We regard it as especially applicable to the instant case because the facts in this case relative to residence in Indiana are quite as strong as in the California case, and the pertinent statutes of Indiana relative to corporations of other states transacting business in Indiana are substantially the same as those of California."

In *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U.S. 165, the facts show that the Bethlehem Corporation

(defendant) was a Delaware corporation doing business in New York; that in conformity with New York law, it had appointed an agent upon whom a summons could be served within the state of New York; that the Neirbo Co. (plaintiff) was a resident of the state of New Jersey. Suit was brought in the District Court for the Southern District of New York on the ground of diversity of citizenship. The District Court set aside the process and dismissed the complaint because it was not brought in the district of residence of either the plaintiff or the defendant. The sole question, said this Court, was whether Section 51 (Tit. 28 U.S.C., Sec. 112) of the Judicial Code was satisfied by the designation by the Bethlehem Corporation of an agent to accept service of process in conformity with the law of the state of New York. Mr. Justice Frankfurter, speaking for this Court, said:

> "That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of Schollenberger's case.
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> * * * * *
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> "In finding an actual consent by Bethlehem to be sued in the Courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that 'state legislation and consent of parties may bring about a state of facts which will authorize the Courts of the United States to take cognizance of a case.' Ex parte Schollenberger, supra, 96 U. S. at page 377."

That is to say, by such consent, the state of New York became the district of "residence" of the Bethlehem Corporation, where it could both *sue* and *be sued.*

It should be noted that the *Neirbo* case was not a stockholder's suit, and that the 1936 amendment to Section 51 of the Judicial Code was not involved. The case rested

solely on the "consent" principle, which, as the Court observed, "supplanted the immunity as to venue." The 1936 amendment merely gives the benefit of the "consent" principle to a stockholder who sues in behalf of a corporation under a state law.

The courts below try to sidestep the effect of the *Neirbo* decision with the fictitious explanation that (R. 54):

> "the designation by such corporation, as a condition of doing business within a state, of an agent upon whom process may be served in that state, is an effective consent to be *sued* in the Federal Courts of that state.
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> "That case did not change the rule as to the right of individual defendants to object, but expressly recognizes it (page 168); nor does it extend the right of Phoenix, authorized to do and doing business here, to *bring* suit as contrasted with the right to be *sued.*"

The fallacy of this reasoning is apparent upon analysis. In the first place, the purpose of the 1936 amendment is to enable a stockholder to sue in those cases where the corporation itself will not do it because it is under the control of the offending officers, as in this case (R. 15). Secondly, the amendment itself, in providing the district where suit "might have been brought by such corporation," impliedly recognizes that the corporation can sue if it were free from the control of the offending officers. To assert, as the courts below did, that under the *Neirbo* case the Phoenix Corporation could be *sued,* but could not *bring* suit, amounts to this: the residence of the Corporation is fixed in the Southern District of New York in order to subject it to suit under one provision of state law (Section 224, *supra,* p. 13), but the benefit of that residence is withheld from the corporation if it should need to sue under another provision of state law which gives it that right (Sec. 223, *supra,* p. 12). In *Overfield* v. *Pennroad Corp.,* 113 F.(2) 6, C.C.A. 3, the court distinctly holds that in a stockholder's suit under Section 51, as amended, the cor-

poration "could have maintained a suit in the court below for the same cause of action on the ground of diversity of citizenship." Let us assume the Phoenix Corporation, instead of petitioner, had filed the instant suit. Under the holding of the courts below the Corporation could not have sued in the Southern District of New York, where it maintains its office and principal place of business, for two reasons:—because the corporation "is a Delaware corporation, and, therefore, is a resident of that state" (R. 52); and, because the *Neirbo* case, as the courts below understand it, does not recognize in the corporation the right "to *bring* suit as contrasted with the right to be *sued*" (R. 54). But the meaning of the *Neirbo* decision is that a corporation may, by going into another state, acquire a *residence* there, and that the filing of a designation of an agent under the legislation of that state, upon whom "all process in any action or proceedings against it may be served" (Art. 13, Sec. 210(1), New York General Corporation Law) is evidence that the corporation has acquired a residence in that state, thus supplanting the corporation's immunity as to venue in an action against it. If a corporation can, under Section 51 of the Judicial Code, acquire a foreign residence to which it will be held in an action *against* it, the converse must also hold true, namely, that the corporation must have the same residence for the purpose of *bringing* suit, as it has for the purpose of being *sued*. The concept of *residence* means living in a particular locality; it simply requires bodily presence as an inhabitant in a given place (*Matter of Newcomb*, 192 N.Y. 238, 250). No court, therefore, should say that for jurisdictional purposes a person, whether natural or juristic,* *lives* or is *bodily present* in a district when it is being *sued*, but not when it *brings* suit. To split the concept of residence along

* "In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual."—Lord Loreburn, L.C., in *De Beers Consolidated Mines, Ltd.* v. *Howe* (1906) A.C. 455, 458, H.L.

those lines would result in incalculable confusion as to the civil status, rights and responsibilities of those persons. Were the corporation to be denied the right to bring suit in the same district in which it can be sued, there would be a denial of the constitutional right to due process of law (*Pennoyer* v. *Neff*, 95 U.S. 714, 733; *Truax* v. *Corrigan*, 257 U.S. 312, 332; *Gramis* v. *Ordeau*, 234 U.S. 385, 394; *Owens* v. *Battenfield*, 33 F.(2) 753, C.C.A. 8, *c.d.* 280 U.S. 605). Venue must be uniform, whether for purposes of suing or being sued. It cannot be discriminatory against the corporation because of its position as plaintiff in the action. Lastly, respondents could not object to the venue of the action, as stated by the court below (R. 54), because the corporation itself could have sued them in New York and process could have been served on them there under a state statute applicable to the facts of this case (Art. 25, Sec. 229-b, Civil Practice Act, *supra*, p. 13).

In short, the decision of the Circuit Court of Appeals in the instant case, disregards and nullifies the provisions of the 1936 amendment to Section 51 of the Judicial Code; is inconsistent with its own decision in *Schwarz* v. *Artcraft Silk Hosiery Mills, Inc.*, 110 F.(2) 465, 467;* is in conflict with the decisions of other Circuit Courts of Appeals (*Overfield* v. *Pennroad*, 113 F.(2) 6, C.C.A. 3; *Dodge Mfg. Co.* v. *Patten*, 60 F.(2) 676, C.C.A. 7); and reads into the *Neirbo* decision a limitation which, if allowed to stand, will

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* The District Court relied on *Philipbar* v. *Derby*, 85 F.(2) 27-30, C.C.A. 2, to sustain the motion to dismiss (pp. 52-53), and disregarded the later case of *Schwarz* v. *Artcraft Silk Hosiery Mills, Inc.*, 110 F.(2) 465, 467, C.C.A. 2, which explains the *Philipbar* case as follows: "In Philipbar *v.* Derby, 2 Cir., 85 F. 2d 27, we held that 28 U.S.C.A. § 112, so limited the venue in a derivative suit by a stockholder of a corporation that such a suit could be brought in a federal court only in a district where the corporation might have brought it. Since the decision in Neirbo Company et al. *v.* Bethlehem Shipbuilding Corporation, Ltd., 308 U.S. 165, 60 S. Ct. 153, 84 L. Ed.—Nov. 22, 1939, it may be that this corporation is to be treated as a resident of the Southern District of New York."

destroy its value as a liberal interpretation of Section 51 of the Judicial Code in its relation to foreign corporations operating under the "consent" principle of state legislation, and once more throw stockholders back upon the strict construction of that section, with its manifest injustices to them, which it was the purpose of the 1936 amendment to correct.

A writ of certiorari should be granted in order that this court may review the decision of the Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

SYDNEY A. SYME,
THOMAS H. MATTERS, JR.,
DONALD HORNE,
Attorneys for Petitioner,
521 Fifth Avenue,
New York, N. Y.